

November 27, 2019

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of Ex Parte Presentations – Yodel Technologies LLC - *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* - CG Docket No. 02-278

Dear Ms. Dortch:

On November 25, 2019, Robert Pulsipher, an owner of Yodel Technologies LLC (“Yodel” or “Company”), Kyle Wood, Chief Executive Officer of Yodel, and Gabrielle Walthers, General Counsel and Chief Compliance Officer of Yodel, along with Eric J. Troutman and Paul C. Besozzi of Squire Patton Boggs (US) LLP, outside counsel for Yodel, met with (a) Patrick Webre, Chief Bureau of Consumer and Governmental Affairs (“CGB”), Zac Champ, Chief of Staff, CGB, Kristi Thornton, Associate Chief, Consumer Policy Division & Information Access & Privacy Office, CGB (by telephone), and Jerusha Burnett, Attorney Advisor, CGB, (b) Commissioner Michael O’Rielly and Joel Miller, Chief of Staff and Senior Legal Advisor, Media to Commissioner O’Rielly, (c) Commissioner Brendan Carr and Joseph Calascione, Acting Wireline Legal Advisor to Commissioner Carr, and (d) Travis Litman, Chief of Staff to Commissioner Jessica Rosenworcel.

During the course of the meetings, Yodel reviewed and discussed the positions reflected in its Petition for Expedited Declaratory Ruling or In the Alternative Retroactive Waiver (“Petition”) and its Reply Comments, including the following:

1. **Background On Petition** – Yodel comes before the Commission as its future existence is threatened. The Company offers its customers a platform employing soundboard technology, which uses short, prerecorded snippets that are played by a live agent as part of an interactive live call. As noted in its Petition, Yodel, in good faith, reasonably relied on September 2009 guidance from the Federal Trade Commission (“FTC”) that this technology was not the use of a prerecorded

47 Offices in 20 Countries

Squire Patton Boggs (US) LLP is part of the international legal practice Squire Patton Boggs, which operates worldwide through a number of separate legal entities.

Please visit squirepattonboggs.com for more information.

voice message for purposes of the Telemarketing Sales Rule (“TSR”). As such, the Company authorized users of its platform to place calls to landline phones. At the time, there was no contrary FCC directive¹ and the language of the Telephone Consumer Protection Act (“TCPA” or “Act”) regarding prerecorded messages mirrored that of the TSR.

Seven years later, in November 2016, the FTC reversed its decision and allowed soundboard providers six months (until May 12, 2017) to adjust their practices. Yodel did so, but in June of 2017, the Company was added to a class action lawsuit for violating the TCPA’s restriction on use of prerecorded messages, for calls made during the period permitted by the FTC guidance.² Although Yodel updated its practices in conformity with the FTC’s rulings, the TCPA’s four year statute of limitations allowed class counsel to sue Yodel for calls made while the FTC’s guidance was in effect.

A Federal District Court has now ruled (and refused to reconsider) that Yodel’s employment of prerecorded messages during a live, interactive, call is covered by the TCPA and the Company faces millions of dollars in potential liability as a result.

With the prospect of the end of the Company on the horizon, Yodel petitioned the FCC, the expert agency responsible for implementing and interpreting the Act, to declare and clarify that the TCPA prerecorded message requirements do not apply to short message snippets played as part of a live interaction with a consumer. More generally, Yodel seeks clarity that the use of any prerecorded message within an otherwise live call does not, in and of itself, trigger the TCPA’s delivery restrictions concerning prerecorded calls. In the alternative, Yodel has asked the Commission for a retroactive waiver for failure to comply with such restrictions, covering the period up to May 12, 2017. Prompt Commission action is essential.³

2. **Soundboard Technology: Users and Benefits** – Again, Yodel further explained that soundboard technology involves a live agent on every call – a one-to-one human interaction scenario. Although the calls might be made via different modes, a live agent is always present on the call and interacts with the called party through the playing of prerecorded scripts (developed by its clients) in response to the called party’s own live comments. The agent is able to speak with the called party if needed. No static, non-interruptible message from call-start to call-finish is involved.

Yodel’s clients use the Company’s soundboard platform to provide customer services, political action campaigns, market research, education and other informational and servicing calling. Other clients use the platform for reaching out to consumers interested in home-related services (e.g.,

¹ And there has been none since.

² The Commission was already aware of this lawsuit, which was referenced in a similar Petition filed by Yodel’s client, NorthStar Alarm Services. “Consumer and Governmental Affairs Bureau Seeks Comment On Petition for Expedited Declaratory Ruling by NorthStar Alarm Services, LLC,” DA 19-74, Public Notice, (rel. Feb. 12, 2019).

³ The Court has refused to stay the case pending Commission resolution of the issue.

window replacement). The platform also is commonly employed by call centers receiving inbound calls.

Use of soundboard technology offers benefits to the live agents, the user companies and consumers. Soundboard can provide employment opportunities to individuals who, because of their accent or speech impediments, might otherwise not be able to gain such work. Use of the uniform clear messaging controlled by the agent assists in that regard.

For the companies using soundboard, the technology provides a platform that can keep agents “on script” and reduce the prospect of non-compliant, “outlier” actions such as misrepresentations or even fraudulent activity. Use of soundboard helps consistency and compliance. These can be issues in call-center environments where agents are expected to repeat the same messages over a long shift on the phones. Using soundboard prevents deviation and going “off script.” Mr. Pulsipher noted on several occasions there is “no fraud button” in the Yodel system.

For consumers, use of soundboard presents a consistent voice. There is an immediate ability to interact with a live agent through clear messages and not be dealing with a fatigued, frustrated individual. The technology promotes customer satisfaction, particularly in the customer service context.

3. **Yodel Is Serious About TCPA Compliance** – Contrary to the suggestions otherwise, Yodel outlined how it is deadly serious about TCPA compliance. The Company conducts weekly audits of web sites which are the source of information on those to be called using soundboard. The Company reviews consent language employed for web opt-ins on those sites, taking weekly snapshots. If discrepancies are found, Yodel will go back to the web site to address.

Yodel employs third-party verification services Jornaya and TrustedForm,⁴ which track entry of information by those consenting through web opt-ins. In addition, these services provide a record of such activity and the consent provided and can confirm that there was agreement to be contacted. The Company maintains Do Not Call lists and scrubs numbers to be called against those lists. This is also a weekly process. Yodel also closely monitors the content of scripts deployed by its clients to assure the technology is not being misused. Finally, Yodel performs quality assurance checks to ensure that live agents are following scripts and corrects “off-script” situations.

Yodel is a company with a culture of TCPA compliance. Its Chief Compliance Officer made that clear in each meeting.

4. **Scope And Focus Of Petition: TCPA Prerecorded Message Requirement** - Yodel reiterated that the scope of its Petition is a narrow one. Contrary to the assertions of opponents, the Company does not seek some broad-based exemption for soundboard technology from TCPA requirements.

⁴ See <https://www.jornaya.com/> and <https://activeprospect.com/products/trustedform/>

If an ATDS is involved, then the TCPA requirements apply. As would those involving consent. The Petition does not address the mode of delivery or the content.⁵

The sole focus of the Petition is on whether Yodel's use of prerecorded messages in an otherwise live call is covered by the TCPA prerecorded message requirements. Opponents' claims to the contrary are blatantly false.

5. The TCPA Prerecorded Message Requirements Do Not Apply To Yodel's Use In An Otherwise Live Call – Yodel explained that the application of the TCPA to any prerecorded message used in a live call context would mean that messages informing callers that “this call is being recorded for quality assurance purposes” could be deemed a TCPA violation if caller identification and an opt-out option were not provided as part of that recording. In the Yodel context, it would mean each and every short message played by the live agent would have to include such identification and opt-out requirements.⁶

As noted in the Company's Petition and Reply Comments, the Company explained that the reasonable, logical and proper interpretation of Section 227(b)(1)(B) of the Act – the one consistent with the legislative history of the TCPA and repeated FCC suggestions in various decisions – is that this provision of the Act applied to calls in which the entire call – from initiation to conclusion – was prerecorded.⁷ Yodel again made reference to the “frustration” cited by Senator Hollings that consumers could not register their discontent to a live person. Such is not the case with Yodel's soundboard platform – a live person is on each and every call. Rather, non-dynamic, static prerecorded calls were the statutory target.

The Commission should not adopt a statutory interpretation that would have the unintended consequences of sweeping under the TCPA prerecorded message requirements each and every type of prerecorded message, including those that are part and parcel of a live call.⁸

6. The Commission Has Authority To Approve The Requested Retroactive Waiver - The Company repeated that Congress has given the Commission the responsibility and authority to implement and interpret the TCPA. Embedded in that authority is the power to grant a waiver of liability to those who reasonably relied on the FCC's repeated suggestions prior to any new reinterpretation of the prerecorded call provisions of the Act. That power is well implied, if not

⁵ If there is misuse of soundboard technology, Yodel agrees that too must be redressed. Its Petition in no way seeks any excuse for improper usage or abuse of the technology. However, the Company's view is that the potential for misuse cannot be grounds for the conclusion that any and all use of prerecorded messages are covered by the TCPA. Different remedies exist for such misuse and Yodel has not asked the Commission for an ounce of redress on that point.

⁶ See 47 U.S.C § 227(d); 47 C.F.R § 64.1200(b).

⁷ See Petition, at pp. 4-7; Reply Comments, at pp. 6-9.

⁸ However, if it were inclined to do so, the Commission should follow the lead of the FTC and interpret the TCPA to not apply to soundboard technology, but then commence a notice and rulemaking procedure providing affected entities the opportunity to adjust their practices and technologies over a 6-month period.

expressly permitted, by Section 1.2 of the Commission's rules.⁹ If the Commission decides now to expand the applicability of the prerecorded call requirements, the circumstances here fully justify the exercise of that authority to provide the retroactive waiver that Yodel has requested.

For all these reasons, along with those set forth in the Company's Petition and Reply Comments, Yodel urged, in each of the meetings, that the Commission grant the Petition or the requested retroactive waiver.

Respectfully submitted,



Paul C. Besozzi
Eric J. Troutman
Squire Patton Boggs (US) LLP
2550 M Street, NW
Washington, DC 20037
202-457-6000 (tel)
202-457-6315 (fax)
paul.besozzi@squirepb.com
eric.troutman@squirepb.com

Counsel for Yodel Technologies LLC

cc: Commissioner Michael O'Rielly
Commissioner Brendan Carr
Joel Miller
James Calascione
Travis Litman
Patrick Webre
Zac Champ
Kristi Thornton
Jerusha Burnett

⁹ See Yodel Reply Comments, at pp. 9-12.